IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 690

MINERSVILLE SCHOOL DISTRICT, BOARD OF EDUCATION OF MINERSVILLE SCHOOL DISTRICT, consisting of DAVID I. JONES, DR. E. A. VALIBUS, CLAUDE L. PRICE, DR. T. J. MCGURL, THOMAS B. EVANS and WILLIAM ZAPF and CHARLES E. ROUDABUSH, Superintendent of Minersville Public Schools, *Defendants-Petitioners,*

vs.

WALTER GOBITIS, Individually, and LILLIAN GOBITIS and WILLIAM GOBITIS, Minors, by WALTER GOBITIS, Their Next Friend, *Plaintiffs-Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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FOR AMERICAN CIVIL LIBERTIES UNION

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* See Appendix A.

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Preliminary Statement.

The American Civil Liberties Union is a non-partisan, non-sectarian organization, national in scope, with members in Pennsylvania, whose purpose is to defend fundamental American civil liberties as guaranteed in the Constitution of the United States, particularly in the Bill of Rights, wherever, whenever, and by whomever attacked.

None of the signers of this brief are members of Jehovah's Witnesses, nor do they share the religious conviction that saluting the flag violates the law of God. But they and the Union consider that the issues raised by the record in this case, and the still graver issues which lie just beyond it, are of vital importance not only to the religious freedom of individual American citizens, but to the sources of that deep affection and confidence from which alone can spring an abiding popular loyalty to the American system of government and the American flag.

The Union accordingly files this brief in support of the decision of the District Court for the Eastern Pennsylvania District (R. 15-27; 120-127; 21 F. Supp. 581; 24 F. Supp. 271) affirmed unanimously by the Circuit Court of Appeals for the Third Circuit (R. 155; 108 Fed. (2nd) 683); and submits that these Courts rightly decided the issues of law raised in this case.

The Issues.

This case comes before this Court on Writ of Certiorari from the United States Circuit Court of Appeals for the Third Circuit.

The questions involved are (1) did the petitioners, as a school board, have the right to expel the minor respondents from the public schools of the District for failure to salute the flag on religious grounds? and (2) did the petitioners, as a school board, have the right to impose as a condition to the minor respondents' continued attendance at school a requirement that they salute the flag?

Both of these questions the Court below answered in the negative. The American Civil Liberties Union submits that this answer was correct.

Jurisdiction.

No error as to the assumption of jurisdiction of the District Court has been specified by the petitioner (Pet. B.* p. 14) and consequently this point is not in issue before this Court. Nevertheless, the District Court found that the matter in controversy exceeds the sum or value of $3,000 (R. 123-4) (*Judicial Code*, Sec. 24(1)). Although the District Court did not so hold, it seems that it also had jurisdiction under *Judicial Code*, Sec. 24(14) (*Hague* v. *Committee for Industrial Organization*, 307 U. S. 496).

Statement of Case.

This suit began as a bill in equity (R. 4-12) filed in the United States District Court for the Eastern Pennsylvania District, by a father and his two minor children (the respondents herein) whereby they sought to enjoin the authorities of the Minersville School District, (1) from excluding the two minor plaintiffs from the public schools of said District, and (2) from requiring the two minor plaintiffs to salute the flag of the United States of America as a condition of their continued attendance at said schools. The defendants filed a motion to dismiss (R. 13-14), which the District Court overruled in an opinion (R. 15-27; 21 F. Supp. 581). The defendants then answered (R. 28-38), and the case was tried upon evidence (R. 41-104), after which the court found the facts substantially as alleged by the plaintiffs (R. 105-120), filed a further opinion summing up its conclusions (R. 120-127; 24 F. Supp. 271), and made a decree (R. 128-129) granting the relief sought. The defendants appealed to the United States Circuit Court of Appeals for the Third Circuit (R.

* Petitioners' Brief will be referred to as "Pet. B. p. "; Record, as "R. ".

131-149), and that Court in an opinion (R. 155; 108 Fed. (2nd) 683) affirmed the decree of the District Court.

The facts of the case are simple. The minor respondents, William and Lillian Gobitis, children of the respondent, Walter Gobitis, are residents of the Minersville School District of Minersville, Pennsylvania, and have resided there for many years. The petitioners are the duly elected and acting Board of Education of such School District and have the management and control of the Minersville Public Schools (Findings, R. 113-114). The Statutes of Pennsylvania[1] require that the minor respondents must attend public schools, or obtain equivalent private instruction, until they are 18 years old (*Purdon's Pennsylvania Statutes, Title* 24, *Sec.* 1421, as amended July 1, 1937, by 1937 Laws of the General Assembly of Pennsylvania, No. 478, Section 4). Pursuant to these provisions, Lillian is required to attend until November 2, 1941, and William until September 17, 1943. The Statutes of Pennsylvania moreover afford a right to the minor respondents to attend the Minersville Public Schools until they have either completed a four-year high school course or are 21 years old respectively (*Op. Cit., Title* 24, *Secs.* 331, 1371, 1581, 1582). The instruction prescribed for the minor respondents by the Statute includes "civics, including loyalty to the State and National Government" (*Op. Cit., Title* 24, Sec. 1551). Purporting to act pursuant to the latter statute, the Board of Education of the Minersville Public Schools on November 6, 1935, adopted a school regulation requiring the Superintendent of the Minersville Public Schools to demand "that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag

[1] See Appendix A.

shall be regarded as an act of insubordination and shall be dealt with accordingly" (R. 114-117).

It should here be noted that for "insubordination or other bad conduct" pupils may be proceeded against in the Juvenile Courts of Pennsylvania as delinquents (*Purdon's Pennsylvania Statutes, Title* 24, *Sec.* 1477) and, in the Court's discretion, may be committed to the custody of some family, not their parents, or of a public institutional school (*Op. Cit., Title* 11, *Secs.* 244, 246, 250).

The practice in the Minersville Public Schools appears to be for the teacher and pupils to rise at the opening of school, place their right hands on their breasts and speak the following words: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." While the words of the pledge are being spoken, it is customary for the teacher and pupils to extend their right hand so as to salute the flag.

The respondents are members of an unincorporated association of Christian people designated as Jehovah's Witnesses. Each of the respondents as a member of this group "has covenanted with Jehovah God to obey the commandments of God and to preach the gospel of the Kingdom as contained in the Bible" (Petitioners' Finding 9, R. 114-117). The minor respondents failed to salute the national flag at the daily exercises of the Minersville Public Schools because, as found by the District Court (R. 106-108), they believed the act of saluting a flag contravenes the law of God as written in the Bible. That finding is here set forth in full:

> "7. That plaintiffs are members of an unincorporated association of Christian people designated as Jehovah's Witnesses; that each and every one of Jehovah's Witnesses has entered into an agreement

or covenant with Jehovah God, wherein they have consecrated themselves to do His will and to obey His commandments; they accept the Bible as the Word of God, and conscientiously believe that a failure to obey the precepts and commandments laid down therein will in due time result in their eternal destruction. Plaintiffs and all of Jehovah's Witnesses sincerely and honestly believe that the act of saluting a flag contravenes the law of Almighty God in this, to wit:

(a) To salute a flag would be a violation of the Divine commandment stated in verses 4 and 5 of the twentieth chapter of Exodus of the Bible, which reads as follows, to wit:

"Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them * * *",

in that said salute signifies that the flag is an exalted emblem or image of the government and as such entitled to the respect, honor, devotion, obeisance and reverence of the saluter.

(b) To salute a flag means in effect that the person saluting the flag ascribes salvation and protection to the thing or power which the flag stands for and represents, and that since the flag and the government which it symbolizes are of the world and not of Jehovah God, it is wrong to salute the flag, and to do so denies the supremacy of Almighty God, and contravenes His express command as set forth in Holy Writ.

Affirmed as to plaintiffs. M."

On November 6, 1935, the minor respondents were expelled from the public schools "for this act of insubordina-

tion, to wit, failure to salute the flag in our school exercises"; and since that time they have not attended the Minersville Public Schools. Lillian has instead attended, from late December, 1935, to May, 1937, the Jones Kingdom School at Andreas, Pennsylvania; and subsequent to September, 1937, the Pottsville Business College; while William has been attending the Jones Kingdom School (R. 116-117).

The District Court also found that the respondents are American citizens who honor and respect their country and state and willingly obey its laws, but that they nevertheless believe that their first and highest duty is to God and His commandments and laws, as they understand them (R. 108).

Summary of Argument.

The decree of the District Court declares (R. 128):

> That the regulation of the Board of Education of the Minersville Public Schools adopted on the sixth day of November, A. D., 1935, which said regulation is in words and figures as follows, to wit:
>
> > "That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly."
>
> as applied to the minor complainants as a condition of their right to attend the Minersville Public Schools is null and void in that it deprives them of liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Following the language of this decree, we shall submit argument in support of these three propositions:

First: The right to entertain the belief, to adhere to the principle, and to teach the doctrine, that the act of saluting a flag contravenes the law of Almighty God is a part of the liberty referred to in the Fourteenth Amendment to the Constitution of the United States.

Second: The State of Pennsylvania deprived the respondents of this liberty by requiring them to surrender it as a condition of the minor respondents' continued attendance at the Minersville Public Schools.

Third: The State of Pennsylvania, in thus depriving the respondents of this liberty, acted without due process of law, in that the School Board's Regulation was not a proper exercise of the State's police power.

The considered and unanimous judgment of this Court in *Hamilton* v. *Regents*, 293 U. S. 245, we accept as conclusive, both in reason and authority, upon the point which it decides. In the course—and as an integral part—of our argument, we shall submit the grounds of our contention that that decision does not control the present issue, as the *per curiam* decisions in *Leoles* v. *Landers*, 302 U. S. 656; *Hering* v. *State Board of Education*, 303 U. S. 624, and *Johnson* v. *Town of Deerfield*, 306 U. S. 621—inadvertently, as it seems to us—assumed.

ARGUMENT

POINT I

The right to entertain the belief, to adhere to the principle, and to teach the doctrine, that the act of saluting a flag contravenes the law of Almighty God, is a part of the liberty referred to in the Fourteenth Amendment to the Constitution of the United States.

A. This belief and doctrine, so far as the respondents are concerned, are religious in character

In spite of the express finding of fact (*supra*, pp. 5-6) of the District Court that the salute to the flag has a religious significance to the respondents (see 24 F. S. 271, at 274)—a finding by which this Court is bound in its consideration of questions of law raised by petitioners—the petitioners devote five pages of their brief (Pet. B., pp. 27-32) to argument to the effect that the refusal of the Gobitis children to salute the national flag was not founded on a religious belief.

Petitioner's argument in this respect would perpetuate the same error into which the several State Court decisions have been led. *Nicholls* v. *Mayor*, 7 N. E. (2d) 577, 580 (Mass. 1937); *Leoles* v. *Landers*, 184 Ga. 580, 587; *People* v. *Sandstrom*, 279 N. Y. 523, 529. For the argument in petitioners' Point IV is not directed to a decision by this Court of a point of law, *but to a determination by it of a theological and religious belief*. This Court is urged by the petitioners to hold *inter alia* that a salute to the flag is not "bowing down to a graven image" and that "the precepts and commandments in the Bible *approve* of the salute."

The Court is referred—in order to decide *this theological question*—(Pet. B., p. 31) to quotations from Scripture, *inter alia*, *Matt.* 10:12; *Matt.* 22:21; *Romans* 13:7; I *Peter* 2:17.

With the greatest deference, we submit that the Supreme Court of the United States does not sit to determine questions of religious or theological belief; nor does any other court, or school board in this land have the right to hold that a flag salute is or is not a religious ceremony or of religious significance, or to determine the religious beliefs for children or adult American citizens.

As the District Court stated in its opinion (21 *F. S.*, 581, 584):

> "If an individual sincerely bases his acts or refusals to act on religious grounds they must be accepted as such and may only be interfered with if it becomes necessary to do so in connection with the exercise of the police power, that is, if it appears that the public safety, health or morals or property or personal rights will be prejudiced by them. To permit public officers to determine whether the views of individuals sincerely held and their acts sincerely undertaken on religious grounds are in fact based on convictions religions in character would be to sound the death knell of religious liberty."

In the well-known case of *Davis* v. *Beason*, 133 U. S. 333, Mr. Justice FIELD thus expressed the unanimous opinion of the Court:

> (p. 342) "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.

> The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others. * * * With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of the people, are not interfered with."

The respondents' beliefs, as found by the District Court in response to their Requests for Findings of Fact Nos. 7-10 (R. 106-108), fall within Justice FIELD's conception of religion. It would be a novel doctrine to assert that the first two commandments of the Decalogue do not affirm something about the believer's relations to his Creator and the obligations which they impose of reverence for His being and character. Nor does it seem possible to argue that the construction which the respondents put upon these commandments is beyond the power of rational belief.

In the brief filed by the American Bar Association's Committee on the Bill of Rights, a number of historical instances are cited (to which we refer) in which honest and serious religious scruples were, in fact, asserted in spite of the majority to comprehend the religious significance of the acts to which these scruples were opposed.

Although the Supreme Judicial Court of Massachusetts in *Nicholls* v. *Mayor and School Committee of Lynn*, 7 N. E. (2nd) 577 (and other State Courts have agreed), said:

> (p. 580) "The flag salute and pledge of allegiance here in question do not in any just sense relate to religion. They are not observances which are religious in nature. They do not concern the views of anyone as to his Creator. They do not touch upon his relations with his Maker. They impose no obligations as to religious worship. They are wholly patriotic in design and purpose."

it added, only ten lines further down in its opinion:

> (p. 580) "It is assumed that the statement of beliefs of the petitioner made by him is genuine and true and constitutes the ground of his conduct."

This seems to us to concede the essential point. Of course, the flag salute is not intended as an act of worship, but simply as an expression of loyalty to that great cooperative enterprise in which every American citizen must share. If, however, it be any citizen's belief that it is a religious ceremony and a violation of God's law, and not a proud expression of partnership with a free people, then the attempt to compel his participation in the ceremony can only confirm him in his belief and give to the flag salute the very character which it disclaims.

Furthermore, it seems to us that to say that the act is not a religious rite is an evasion of the issue. One may have conscientious reasons or religious reasons for refusing to commit an act, without such being considered a religious rite. Some people believe that dancing is forbidden by the law of God. Some believe the law of God forbids attendance of their children at the public schools. Some believe it is sinful to eat pork. Such beliefs do not make

dancing, attendance at school, or the eating of pork, religious rites. Nevertheless, to compel such persons to perform such acts would certainly violate conscience and infringe on the free exercise of religious profession and worship.

We cite a few illustrations:

(a) *Attendance on dancing class has not been required over objection of parents. Hardwicke* v. *Board of School Trustees,* 54 Cal. App. 696. In this case the parents had conscientious objections to their children being required to take dancing lessons in school. Instead of telling them they could educate their children elsewhere, the court sustained their objections and upheld the right of the pupils to attend school without participation in the exercises.

(b) *Objections to reading of King James version of the Bible in public schools. People* v. *Stanley,* 81 Colo. 276. In this case a child of Catholic parents was permitted to withdraw from the room while the King James version of the Bible was read. Reading of the King James version of the Scriptures in the presence of this Catholic child constituted an infringement of her rights to religious freedom which the court recognized.

(c) *Bowing of head during prayer. Spiller* v. *Woburn,* 12 Allen (Mass.) 127. The School Committee of Woburn had made an order requiring the reading of the Bible and prayer at the opening of school during which each pupil should stand with head bowed. The court held that any pupil did not need to join in the ceremony and could avoid any act of reverence, even bowing the head, if the parent requested it. The court said:

> (p. 129) "Having in view the manifest spirit and intention of these provisions, an order or regulation

> by a school committee which would require a pupil to join in a religious rite or ceremony contrary to his or her religious opinions, or those of a parent or guardian, would be clearly unreasonable and invalid."

This language of the court is clearly applicable to the present case.

B. Liberty of religious belief and doctrine is a part of the liberty referred to in the Fourteenth Amendment.

In *Hamilton* v. *Regents*, 293 U. S. 245, the minor petitioners sought a writ of mandate compelling the Regents of the University of California to permit them to study at the University without taking the course in military training which the regulations of the University prescribed. The petition was grounded on the allegation—which seems not to have been controverted—that the petitioners' religious doctrine forbade them to take part in, or prepare for, war. This Court, speaking unanimously through Mr. Justice BUTLER in an opinion which affirmed the denial of the mandate, stated:

> (p. 262) "There need be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training."

Although the passage above quoted is a dictum not necessary to the decision, we assume that it is a dictum which will now be followed by this Court. It was unanimous; it was an important concession to the contentions of the then petitioners; and it is in harmony with a long line of this

Court's recent decisions in which the right of free opinion, and the free expression of it, is affirmed.

Stromberg v. *California*, 283 U. S. 359;
Near v. *Minnesota*, 283 U. S. 697;
Grosjean v. *American Press Company*, 297 U. S. 233;
Herndon v. *Lowry*, 301 U. S. 242;
Lovell v. *City of Griffin*, 303 U. S. 444;
Hague v. *Committee for Industrial Organization*, 307 U. S. 496;
Schneider v. *State*, 308 U. S. 147.

In the presence of these repeated rulings that the rights of free assembly and free expression of one's sentiments are a part of the liberty protected against State interference by the Fourteenth Amendment, we assume as already established beyond question the proposition that that Amendment secures to each individual *the right to refrain from expressions which do violence to his beliefs.*

It may be pertinent here to notice that the religious freedom which is protected against Acts of Congress by the First Amendment to the Constitution includes also "the free exercise thereof". Worship and the free exercise of religious belief do not consist merely in going to a meeting house, church, or synagogue and there engaging in some formal religious ceremony. They include the right and the privilege to exercise freely one's conscientious, religious beliefs in practice, where such exercise does not interfere with "the laws of society, designed to secure its peace and prosperity, and the morals of the people". *Davis* v. *Beason*, *supra.*

It has been said by Chief Justice HUGHES, with the concurrence of Mr. Justice HOLMES, Mr. Justice BRANDEIS and Mr. Justice STONE, that

> "The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience." *United States* v. *Macintosh*, 283 U. S. 605, at 634 (1931).

That the present clash between the school authorities and the dictates of the respondents' consciences is not only unnecessary but wholly irrelevant to the achievement of any proper purpose of Pennsylvania's public school system will be argued under the third heading of this brief (*infra*, pp. 19-29).

POINT II

The State of Pennsylvania deprived the respondents of this liberty by requiring them to surrender it as a condition of the minor respondents' attendance at the Minersville public schools.

It is apparent that the Minersville Board of Education is an agency of the State of Pennsylvania.

Ford v. *School District*, 121 Pa. 543;

It would seem to follow that the action of the Minersville school authorities is to be deemed state action in the present case.

Sterling v. *Constantin*, 287 U. S. 378;
Lovell v. *City of Griffin*, 303 U. S. 444;
Missouri, ex rel. Gaines v. *Canada*, 305 U. S. 337.

A. A State deprives a citizen of his liberty when it requires him to surrender it as a condition of receiving instruction at a public school.

This Court has recently held that a State which withholds access to a State-supported institution of learning from one of its qualified citizens denies to that citizen the equal protection of its laws.

Missouri ex rel. *Gaines* v. *Canada*, 305 U. S. 337.

From this proposition it seems to us to follow that to require a citizen, as a condition of his admission, to surrender one of the liberties secured by the Fourteenth Amendment, is to deprive him to some extent at least of that liberty (*Terral* v. *Burke Construction Co.*, 257 U. S. 529) and thus to present the question whether that deprivation is without due process of law.

B. More especially does exclusion from a public school deprive the citizen of his liberty when it confronts him with the alternative either of purchasing equivalent private schooling or of finding himself committed to the custody of the State.

We draw the Court's attention again to the Pennsylvania school laws which we referred to above (Appendix A and *supra*, pp. 4-5). The minor respondents are required to attend the public schools or obtain equivalent private instruction until they are respectively eighteen years of age. Furthermore if these respondents "cannot be kept in school * * * on account of * * * insubordination or other bad conduct" they may be proceeded against in the juvenile court as "delinquent children"; and, if so proceeded against, the court may commit them to the custody of some other

family, of an incorporated society, of an institution, or to an industrial or training school. (*Purdon's Pennsylvania Statutes*, Title 24, Sec. 1477; Title 11, Secs. 244, 246, 250.) Consequently when the Board of Education of Minersville voted "that refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly" (R. 114) it did more than threaten the minor plaintiffs with expulsion from school; it threatened them with prosecution and commitment as "delinquent children" which would, in all probability, have been the actual consequence had not their father purchased them private instruction by paying the practical equivalent of a substantial fine.

It is true that the question whether these statutory provisions could have been enforced against the minor plaintiffs upon the facts which appear in this record is not necessarily before the Court in this case.[2] Indeed we hope that, if this Court feels compelled to reverse the decision appealed from, it will make it clear that the reversal is without prejudice to this second question of law. But it is pertinent to point out the practical issues which confronted the respondents and the practical consequences which will follow from a reversal of the decree below. If the decisions below are reversed it seems more than probable that this Court will presently be called upon to rule either (1) that children who will not salute may thereby relieve themselves of the obligation of school attendance altogether, or (2) that children may be taken from their parents' homes and imprisoned, in consequence solely of a conscientious refusal to salute the flag of the United States.

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[2] We are informed, however, that this very question, as presented by the analogous statutes of Massachusetts, is now pending before the Supreme Judicial Court of that State.

No such consequence as this was foreshadowed by the decision of this Court in *Hamilton* v. *Regents*, 293 U. S. 245:

> (p. 262) "California has not drafted or called them to attend the university."

Every child in Pennsylvania is by that State's statutes "drafted" to attend some school.

POINT III

The State of Pennsylvania in thus depriving the respondents of their liberty, acted without due process of law in that the School Board's regulation was not a proper exercise of the State's police power.

We are thus brought to what, as we see it, is the true point of the dispute in this case. The respondents believe that God has commanded them to withhold the salute from any flag whatsoever,—and of their obligations to their Creator they must, of necessity, be the final judges on this earth. That the Board of Education of Minersville has deprived them of the liberty of school attendance,—and threatened to deprive them of other liberties,—in consequence of their loyalty to their religion, seems to us perfectly clear. Was it within the Board of Education's authority, as the body charged with the secular education of the children of Minersville, to do what it has done? Was it within the police power of the State acting through its agency, the School Board?

We know of no direct precedent for the solution of such a problem under the Constitution of the United States. The precedents submitted by the American Bar Association's Committee are from Rome, and from England before the

present government of this country was formed. It has long been an article of faith of the American people that their government differed from all the governments which preceded it throughout history in that it was so constructed that it could act only as the supporter, and never as the destroyer, of individual human rights. It has remained for various state legislatures and school authorities to raise,—for the first time, and during the last decade,—the question whether loyalty to the flag of the United States of America was something which must be spontaneous in its very nature, or might, in the discretion of some public official or body, be made a compulsory loyalty akin to the loyalty which was demanded by the eagles of Rome.

In support of what we believe to be the answer demanded by this country's historic tradition, we submit the propositions set forth below:

A. The salute prescribed by the Minersville Board of Education is not—like military service and preparation to render it—a practice which Government may encourage by rewards and punishments, but is a ceremony having no value except as a voluntary expression of sentiment and belief.

In the leading case of *Reynolds* v. *United States*, 98 U. S. 145, this Court set forth with finality and precision the line which separates the liberty of the spirit from the sphere of action in which the authority of government must prevail. After stating the circumstances which led, in 1785, to the enactment of the original Virginia statute for religious liberty, the Court continues:

> (p. 163) "In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined, and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession

or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the State."

(p. 166) "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"

The same doctrine was stated even more succinctly by Pius XII, head of the oldest and greatest religious communion in Christendom in his Encyclical Letter of October 27, 1939:

"No one of good-will and vision will think of refusing the State, in the exceptional conditions of the world today, correspondingly wider and exceptional rights to meet the popular needs. But even in such emergencies the moral law, established by God, demands that the lawfulness of each such measure be scrutinized with the greatest vigor according to the standards of the common good.

"In any case, the more burdensome the material sacrifices demanded of the individual and the family by the State, the more must the rights of conscience be sacred and inviolable. Goods, blood it can demand; but the soul redeemed by God, never." (New York Times, October 28, 1939.)

These extracts, as it seems to us, point out the essential distinction between the case at bar and *Hamilton* v. *Regents*, 293 U. S. 245. The question in that case was

whether a student, who had completed his legally prescribed schooling, could insist on availing himself of the instruction offered at the University of California without taking the course in military training which was there required. The Court, in holding that he had no constitutional right to insist on attending the university upon these conditions, said:

> (p. 262) "Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies."

From this it follows: *first*, as the Court pointed out (pp. 263-4), that government may call upon every citizen to defend its authority in arms; and *second*, that since

> (p. 260) "The States are interested in the safety of the United States, the strength of its military forces and its readiness to defend them in war against every attack of public enemies * * * every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States army or in state militia * * * or as members of local constabulary forces, or as officers needed effectively to police the State."

One way for a State to provide men fit and ready to enter at once upon military duty is to offer rewards to men who will undergo the necessary training; and the opportunity of education at a state university may be offered as a reward. To go further, and to hold that opinions and beliefs about God and the flag of the United States may be made the subject of rewards and punishments—before the fruits of these beliefs have been made manifest in action—

seems to us to be contrary to the sound doctrine of *Reynolds* v. *United States.*

We do not understand it to be contended that the flag salute ceremony has any practical consequences to popular welfare or to the strength and resources of the government apart from the sentiments of loyalty which it is expected to arouse in the pupil's mind. The substance of the defendants' case seems to be stated at the beginning of the reported testimony of Charles Edward Roudabush, the Minersville School Superintendent (R. 91):

> "We feel that every citizen and every child in the public schools should have the proper regard for the emblem of the country, the flag. We have never required the salute of the flag, yet everyone in our school system for twenty-three years, and even longer, has given the salute voluntarily, willingly. The salute of the flag, we believe, is a means of helping to inculcate in the children a love for country, the institutions of the country, and for that reason we have expected the salute from the teachers and the children."

This answer is confirmed and elaborated through Dr. Roudabush's remaining testimony (R. 91-101).

We have been unable to find anything in this testimony to suggest that even Dr. Roudabush holds the opinion that the salute performs a useful purpose if it is given in fear of Divine punishment, or as an outward formality accompanied by resentment and anxiety within the heart.

B. To expel the minor respondents from the public schools of Minersville has no tendency to instruct the youth of Pennsylvania in loyalty to the flag and Constitution of the United States.

Of course, there can be no question, since *Halter* v. *Nebraska*, 205 U. S. 34, and *Gilbert* v. *Minnesota*, 254 U. S.

325, of Pennsylvania's authority to provide for instruction in "civics, including loyalty to the State and National Government" (*Purdon's Pennsylvania Statutes*, Title 24, Sections 1551, 1557) in its public schools. Neither would we contend that the Minersville Board of Education went beyond its province in providing the flag salute exercise described in the record (R. 114-115) as a means of imparting instruction in this field, provided the salute is voluntary.

But we do submit that the purpose of this exercise is frustrated, and not furthered, when two children are expelled because their hearts have not learned how to take part in it; and their school-mates are thereby served with notice that their own salutes will thereafter be rendered, not because they wish thus to honor their country's flag, but because they must. Upon this aspect of the case we cannot do better than invite the Court's attention to the opinion of LEHMAN, *J.*—dissenting from the majority's opinion, but concurring in their result—in the case of *People* v. *Sandstrom*, 279 N. Y. 523, at pages 533-539. This opinion closes as follows:

> (p. 539) "The salute to the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored."

To contend that exclusion from the public schools tends to promote patriotism on the part of the present plaintiffs is simply to say that the findings of the District Court,—

before whom all the respondents testified orally (R. 47-83) —are wrong.

We quote from the District Court's opinion rendered after the hearing:

(R. 124) "No one who heard the testimony of the plaintiffs and observed their demeanor upon the witness stand could have failed to be impressed with the earnestness and sincerity of their convictions."

"The refusal of Lillian and William to salute the flag in the Minersville Public School was based solely upon their sincerely held religious convictions that the act was forbidden by the express command of God as set forth in the Bible. Both they and their father, Walter Gobitis, are loyal American citizens who honor and respect their state and country and who are willing and ready to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God. Their refusal to salute the flag was not intended by them to be disrespectful to the Government and it did not promote disrespect for the Government and its laws nor endanger the public safety, health or morals or the property or personal rights of their fellow citizens."

"The enforcement of defendants' regulation requiring the flag salute by children who are sincerely opposed to it upon conscientious religious grounds is not a reasonable method of teaching civics, including loyalty to the State and Federal Government, but tends to have the contrary effect upon such children."

To say that the respondents' exclusion from the public schools is necessary to preserve the patriotism of their school-fellows, and to prevent the schools from being demoralized, as Dr. Roudabush testified (R. 92), seems to us to lead to conclusions that are wholly untenable. The respondents, since their exclusion, have sought and obtained

private instruction, but—had they not done so—their school-fellows would have taken notice that children who did not participate in the flag salute could escape, not only from that ceremony, but from the whole burden of attending school. This, surely, would be far more demoralizing than merely to exclude the respondents from the school room during the flag salute ceremony, and would threaten the foundations of compulsory school attendance throughout the State.

As the only alternative, the Board of Education would then be compelled to proceed against the respondents as "delinquent children" (*Purdon's Pennsylvania Statutes*, Title 24, Section 1477) and would end by finding itself in the position of demanding that the minor respondents be taken from their parents and placed in the custody of the State. (*Purdon's Pennsylvania Statutes*, Title 11, Section 250.)

This logical consequence of the position taken by the petitioners but illustrates the dilemma in which authority inevitably involves itself when it attempts to command, rather than to inspire, respect. If the commanded forms of respect be not forthcoming, authority must then either acknowledge its impotence—with all the consequent encouragement to anarchy—or else enter upon the enterprise of persecuting its subjects for their beliefs.

C. To follow up the respondents' expulsion by proceeding against them as delinquent children, could not result in loyalty to the Constitution which the flag symbolizes, but only in submission to government of a different kind.

It is impossible, as we think we have shown under our last point, for Pennsylvania to enforce both the flag salute and the compulsory school law (*Purdon's Pennsylvania*

Statutes, Title 24, Section 1421) against all children, unless she is prepared—if need be—to proceed against them as delinquents (*Purdon's Pennsylvania Statutes*, Title 24, Section 1477) and commit them to the custody of strangers for bringing up (*Purdon's Pennsylvania Statutes*, Title 11, Section 250). This Court, we submit, could not sustain the legality of that proceeding without substantially overruling three of its well-considered judgments.

Meyer v. *Nebraska*, 262 U. S. 390;
Pierce v. *Society of Sisters*, 268 U. S. 510;
Farrington v. *Tokushige*, 273 U. S. 284.

In each of the foregoing decisions, this Court affirmed the constitutional right of parents to direct the education and upbringing of their children, and to impart to them their own cultural inheritance and their own faith. In each of them the doctrine that the child is the mere creature of the state was definitely repudiated by this Court. If other children, situated as are these respondents, shall ever be torn from their parents and committed to the custody of a state institution in consequence of their faithfulness to their parents' religious teaching, these decisions would be overruled as to them. And this certainly would not inspire youth with loyalty to the government which protects their liberties, but only with fear of the government which held the power to deprive them of their religion, of their parents, and of their homes.

D. It is not competent for Pennsylvania to involve the flag of the United States in a controversy with its citizens over the forms of respect which loyalty to the flag and Government of the United States demand.

Notwithstanding the decision in *Hamilton* v. *Nebraska*, 205 U. S. 34, we venture to raise the question whether Penn-

sylvania has authority—without the express consent of Congress—to involve the flag of the United States in the unhappy quarrel—the "unnecessary clash"—with its citizens which this brief debates. We cannot find that Congress has ever thought it wise or necessary to prescribe the forms of respect which citizens not on military service shall render to the emblem of the Federal Government. The Nebraska statute which was held valid in *Halter* v. *Nebraska, supra,* did little more than give the national flag the same protection which is afforded to private trade-marks in that State.

Compiled Statutes of Nebraska (1929), Sections 28-605; 28-1101.

Treason against the United States is defined by Article III, Section 3, of its Constitution; and it has been said that even Congress may not enlarge the definition.

United States v. *Greathouse,* 26 Fed. Cas. 1524.

Yet the petitioners, who are required by Pennsylvania law to offer the respondents "regular courses of instruction in the Constitution of the United States" (*Purdon's Pennsylvania Statutes,* Title 24, Section 1557) have pursued a course which might well give unlearned children the impression that the respondents' conduct amounts to a treasonable act.

We again draw the Court's attention to the District Court's finding, upon hearing the testimony of these plaintiffs (R. 123) that these plaintiffs "honor and respect their state and country", and that their refusal to salute "was not intended by them to be disrespectful to the Government and it did not promote disrespect for the Government and its laws". Is this finding of a Federal Court, with

respect to the loyalty of citizens of the United States to the Federal Government, to be subordinated to the ruling of a local school board?

In the field of interstate commerce, it is well settled that there are areas in which States may legislate until they are occupied by Act of Congress, and other areas where they may not legislate at all. May there not be a similar division of the field of possible legislation with reference to the national emblem of the United States?

Conclusion.

It was never more important to reaffirm and give meaning to the principle of religious liberty than today. The principle that matters of religion are to be decided by the individual and not by Government, be it Court, Legislature or Executive, should be unmistakably reaffirmed by this Court in this case. The principle that religious belief and practice are within the guarantees of the First and Fourteenth Amendments, protected from State interference, should be firmly established. And it should be made clear that the only purposes for which a State may exercise its police powers are in the domain of action, and not the heart.

In this case, no practical consideration justifies soiling our national emblem "with the tears of a little child"[3] who, in the view of most of us, may be misguided or even misinstructed, but whose religious convictions, in the absence of overwhelming public necessity, must be respected and not penalized.

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[3] LEHMAN, *J.*, in *People* v. *Sandstrom*, *supra*.

The decree of the Circuit Court below should be affirmed.

Respectfully submitted,

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FOR AMERICAN CIVIL LIBERTIES UNION

APPENDIX A

Extracts from Pennsylvania School Laws

(as found in Purdon's Pennsylvania Statutes, 1936, Compact Edition)

TITLE 24: EDUCATION

SEC. 331. *Elementary schools required to be established, maintained, etc.; other schools may be established, maintained, etc.; kindergartens; cafeterias.* The board of school directors in every school district in this Commonwealth shall establish, equip, furnish, and maintain a sufficient number of elementary public schools, in compliance with the provisions of this act, to educate every person, residing in such district between the ages of six and twenty-one years, who may attend; and may establish, equip, furnish, and maintain the following additional schools or departments for the education and recreation of persons residing in said district * * * namely:

High schools.
Manual training schools.
Vocational schools.
Domestic science schools.

* * * * * *

[and thirteen other specified schools and departments]

SEC. 1371. *Who may attend schools.* Every child, being a resident of any school district in this Commonwealth, between the ages of six and twenty-one years, may attend the public schools in his district, subject to the provisions of this act.

SEC. 1421. (as amended July 1, 1937 by 1937 Laws of the General Assembly of Pennsylvania, No. 478, Section 4) *Compulsory attendance; exceptions; migratory children.* The term "compulsory school age," as hereafter used, shall mean the period of a child's life from the time the child's parents elect to have said child enter school, which shall

not be later than at the age of eight years until the age of eighteen years. * * *

Every child of compulsory school age having a legal residence in this Commonwealth, as herein provided * * * is required to attend a day school in which the subjects and activities prescribed by the State Council of Education are taught in the English language; * * * and such child or children shall attend such school continuously through the entire term during which the public elementary schools in their respective districts shall be in session. * * * Provided, that the certificate of any principal or teacher of a private school, or of any institution for the education of children, in which the common English branches are taught in the English language, setting forth that the work of said school is in compliance with the provisions of this act, shall be sufficient and satisfactory evidence thereof. * * *

SEC. 1477. *Incorrigible, etc. children; proceedings against.* In case any child between eight and sixteen years of age cannot be kept in school in compliance with the provisions of this act, on account of incorrigibility, truancy, insubordination, or other bad conduct, or if the presence of any such child attending school is detrimental to the welfare of such school, on account of incorrigibility, truancy, insubordination, or other bad conduct, then, in any such case, the board of school directors of the proper district may * * * proceed against said child before the juvenile court, or otherwise, as is now or may hereafter be provided by law for incorrigible, truant, insubordinate, or delinquent children.

SEC. 1551. *Enumeration of.* In every elementary public and private school, established and maintained in this Commonwealth, the following subjects shall be taught * * * civics, including loyalty to the State and National Government. * * *

SEC. 1557. *Instruction in Constitution of United States.* In all public and private schools located within the Com-

monwealth * * *, there shall be given regular courses of instruction in the Constitution of the United States.

SEC. 1558. *When instruction in Constitution to begin and terminate and extent of such instruction.* Such instruction in the Constitution of the United States shall begin not later than the opening of the eighth grade, and shall continue in the high school course. * * *

SEC. 1581. *High school and complete high school course defined; classification; junior high schools.* A complete high school course is one requiring four years beyond an elementary course of eight years or six years beyond an elementary course of six years. The Department of Public Instruction shall make such regulation as shall be necessary to insure proper standards for the various grades of the twelve years of the public school program of studies. * * *

SEC. 1582. *Pupils: admission.* In all school districts there shall be admitted to the public high schools therein all children under the age of twenty-one years, residing within the school districts, who shall be found qualified for admission thereto after having undergone such an examination as shall be prescribed by the board of school directors. * * *

TITLE 11: CHILDREN.

SEC. 244. *Jurisdiction of juvenile court; presiding judge.* Except as hereinafter provided, the several courts, as defined in this act, shall have and possess full and exclusive jurisdiction in (a) all proceedings affecting delinquent, neglected, and dependent children; * * * Such court, when exercising the jurisdiction conferred by this act, shall be known as the "juvenile court."

SEC. 246. *Initiation of Proceedings.* The powers of the court may be exercised—

1. Upon the petition of any citizen, resident of the county, setting forth that (a) a child, giving his or her

name, age, and residence, is neglected, dependent, a delinquent, and is in need of care, guidance, and control.

* * *

SEC. 250. *Hearing; court orders.* At the hearing, or any continuation thereof, the judge or judges shall, after an inquiry of the facts, determine whether the best interests and welfare of a child and the State require the care, guidance and control of such child, and shall make an order accordingly.

The court may—

(a) Allow a child to remain in its home under the care of his or her parent or parents, or place such child in a suitable family home, subject, in either case, to the supervision and guardianship of a probation officer, and may require such child to report to the probation officer as often as deemed necessary, and may require such child to be returned to the court for further proceedings whenever the same appears to the court to be necessary.

(b) Commit a child to the care, guidance and control of some reputable citizen of good moral character, subject to the supervision of a probation officer and to report as required in clause (a) of this section.

(c) Commit a child to some suitable institution or to the care of an incorporated association or society, one of whose objects is the care, guidance and control of delinquent, dependent and neglected children, and which is willing to receive said child.

(d) Commit a child to an industrial or training school, or county institution or school maintained for such purpose, willing to receive it, for care, guidance and control.

* * * * *